IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Himmat Patel & another Vs. State of Rajasthan

D.B. CRIMINAL APPEAL NO.456/2002
against the judgment dt.24.4.2002 passed by
Additional Sessions Judge (F.T.), Sirohi,
in Sessions Case No.130/2001.

Date of Judgment: Sept. 18, 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.P.N.Mohanani, for appellants.
Mr.O.P.Rathi, Public Prosecutor.

REPORTABLE BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. This appeal is directed against the judgment dated 24.4.2002 passed by the learned Additional Sessions Judge (Fast Track), Sirohi convicting appellants Himmat Patel of offence u/s.302 IPC and Jaman Bhai under Section 302/34 IPC & sentencing each of them to imprisonment for life and to pay a fine of Rs.100/- and in default of payment thereof, to further undergo one year's rigorous imprisonment.

2. The prosecution case as disclosed during trial is that appellants Himmat Bhai, Jaman Bhai and deceased Vinod Bhai, employees of the diamond factory at Surat, arrived at Mount Abu on 2.3.1999 in the afternoon at about 1.00 P.M. and checked-in the Room No.108 of Hotel named Vilas. They went out and in the evening at 8.00 PM returned. At about 8.30 P.M., while P.W.9 Ashish Kumar was at the counter of the Hotel, appellants Himmat Bhai and Jaman Bhai were seen leaving the hotel in huff. Soon, the third companion Vinod Bhai came down in pool of blood and fell down in the compound. He blurted that appellant Jaman Bhai caught hold of him and appellant Himmat Bhai dealt knife blows on him. PW 9 Ashish Kumar with the help of PW 6 Kana Ram took the injured Vinod Bhai to the hospital on scooter. The duty doctor informed the police of Medico Legal Case. Before the police party could reach, Vinod Bhai breathed his last at 9.15 PM. On arrival of PW 16 Khushal Singh, S.H.O., P.S., Mount Abu alongwith the police party reached at the hospital, PW 9 Ashish Kumar submitted a written report of the incident vide Ex.P.22 to him. PW 9 Ashish Kumar gave description of both the assailants to the police. PW 16 Khushal Singh, S.H.O., flashed message of the incident to all police Outposts and dispatched police constables viz; Hema Ram and Bhaga Ram to check the buses and other vehicles leaving Mount Abu. The appellants were soon spotted boarding the bus parked outside the

office of the Gujarat Travels. Blood spots on their clothes were visible. Both were arrested and their blood stained apparels were seized and packed. The police inspected the Room No.108 of Hotel Vilas. They found the bottles of liquor and glasses on the table. They were sealed and packed for finger print examination. The police prepared the site plan Ex.P.4. In pursuance of the information given by appellant Himmat Bhai, a blood stained knife was recovered at about 11.30 PM. After usual investigation, the police laid chargesheet against appellants for the offence u/ss.302, 302/34 IPC against both the appellants. On the case being committed, the appellants were tried by the Court of Additional Sessions Judge (Fast Track), Sirohi. The learned trial Court found the charge against appellants proved, as such, convicted & sentenced them in the manner noticed above.

3. Assailing the conviction, it is submitted by Mr.P.N.Mohanani, learned counsel, that the evidence on record is unreliable and does not justify the conviction of the appellants. Learned counsel has criticized the oral dying declaration as well as other piece of circumstances. It is also argued that there is no evidence to show that appellant Jaman Bhai shared a common intention with appellant Himmat Bhai in committing murder of Vinod Bhai. In alternate, it is submitted that there was absolutely no

reason for both the appellants for committing the murder of their own friend Vinod Bhai, who had travelled from surat to Mount Abu with them. They had quietly returned to the Hotel at about 8.00 P.M. The alleged incident took place between 8.00 PM to 8.30 PM. The prosecution has not been able to show as to how the incident took place. It is suggested that something might have happened on spur of the moment, which led to the unfortunate incident. There being total lack of intention to commit the murder, the offence against the appellants does not travel beyond Section 304 part II IPC. On the other hand, it is submitted by the learned Public Prosecutor that appellants were arrested within no time. Each piece of circumstances is of conclusive nature leading to irresistible conclusion that it were the appellants and none else, who committed murder of Vinod Bhai.

4. We have considered the rival contentions and perused the record carefully. In the instant case, the prosecution has relied on the following piece of circumstances:

(i) The place of occurrence is the room in which the appellant and the deceased were lodged and last seen together;

(ii) Oral Dying Declaration;

(iii) Recovery of the blood stained knife at the instance of Himmat Bhai;

(iv) Non-explanation of presence of human blood on the clothes of appellant Himmat Bhai;

(v) Presence of human blood on the clothes of appellant Jaman Bhai;

(vi) Presence of finger prints of appellants on the incriminating articles like liquor bottle, glass and table; &

(vii) The conduct of appellants.

5. As to proof by the circumstantial evidence, the well settled law is that for conviction on circumstantial evidence, the following conditions must be fulfilled:

(a) The circumstances from which the conclusion of guilt is to be drawn, should be fully established;

(b) The circumstances should be of conclusive nature;

(c) There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion inconsistent with the innocence of the accused; &

(d) They should exclude every possible hypothesis except the one to be proved.

6. Before we proceed to deal with each piece of circumstances, it will be convenient to survey the ocular evidence produced by the prosecution.

7. PW 1 Wafati Khan, PW 3 Rajendra Kumar and PW 4 Mangilal are formal motbir witnesses. PW 5 Dharmilal Jain is the owner of the Hotel Vilas. He deposed that the hotel was in the name of his wife Vilaswati Jain. He deposed that he had not engaged a regular manager for the hotel but his son PW 9 Ashish Kumar was doing the said job. He is also motbir of the various police memos.

8. PW 6 Kana Ram is an employee of Hotel Sharlimaar, which is located in front of the Hotel Vilas. He deposed that at about 8.30 PM, PW 9 Ashish Kumar asked to accompany him as one of the guests of their hotel was lying in seriously wounded condition in the compound. He had taken Vinod Bhai alongwith PW 9 Ashish Kumar to the hospital on the scooter.

9. PW 7 Kamlesh is the proprietor of the Hotel Shalimaar. He deposed that the Hotel Vilas is in front of his hotel. He further deposed that he had seen PW 9 Ashish Kumar taking an injured person on scooter. He was accompanied by PW 6 Kana Ram. On inquiry, PW 9 Ashish Kumar disclosed that one of the co-guest stabbed the injured and, as such, they were taking him to hospital. PW 10 Vasudev is another hotelier viz; Meera Hotel at Mount Abu. The evidence of this witness is formal in nature.

10. PW 8 Jayash is the brother of deceased Vinod Bhai. He reached at Mount Abu hearing the unfortunate news of murder of his brother. PW 12 Leelesh Bhai deposed that he wasthe Manager in the factory known as Kankadia Diamond at Surat. He identified both the appellants as the employee of the said Factory. He further stated that all the three used to live together i.e. both appellants and deceased Vinod Bhai. He also stated that about sometime back, an oral altercation took place between appellant Himmat and deceased Vinod.

11. PW 13 Praveen Singh is a photographer. PW 14 Dharam Singh, PW 15 Hema Ram and PW 19 Ashok Kumar are the witnesses of link evidence.

12. PW 17 Salim Khan is a driver on Gujarat Travels. He deposed that on the date of incident, he had parked the bus in front of the office of the Gujarat Travels. The police arrested two boys from the bus. There were stains of blood on the clothes they were wearing.

13. PW 16 Khushal Singh is the S.H.O., Police Station, Mount Abu. He has given details of investigation. PW 18 Chain Singh is the Deputy S.P. PW 20 Dinesh Kumar is second incharge of the Police Station, Mount Abu. He has also given details of investigation.

14. PW 2 Dr.N.K.Goyal stated that he conducted the autopsy on the dead body of Vinod Bhai on 3.3.1999 vide Ex.P.3. He noticed the following injuries on his person:

> "1. Incised wound margin clear cut, spindle shape Rt.side ant. to medial side of Rt.eye obliquely downward 3cm x 1/2cm x muscle deep with clotted blood present;
>
> 2. Incised wound Lt. nose to Lt.cheek bone, 3cm x 1/2cm x muscle deep, spindle shape margin clear cut, clotted blood present;
>
> 3. Incised wound dorso medial aspect of Lt.hand 5cm x 1cm x bone visible margin clearcut, spindle shaped, clotted blood present;
>
> 4. Stab wound 1 1/2" x 1/2" x full thickness of ant.abd. Wall Lt. side with protrusion of intestines, clotted blood present;
>
> 5. Stab wound 1cm below inj.No.4 1 1/2" x 1/2" x full thickness of abdomen, protrusion of omentum with

clotted blood;

6. Spindle shape stab wound 4cm x 1/2cm x full thickness of chest wall 1.5cm above the inj.No.4 margin clear cut with clotted blood;

7. Incised wound 2cm x 1/2cm x muscle deep, margin clear cut 4cm above the inj.No.6 & clotted blood, spindle shaped;

8. Incised wound 1cm x 1/2cm x muscle deep 4cm away towards Rt.side of chest wall to inj.No.7 spindle shape, margin clear cut, clotted blood present;

9. Incised wound 3cm x 1cm x muscle deep spindle shape, margin clear cut at base of Rt.thumb dorsal aspect with clotted blood;

10. Incised wound extend from web between Rt. thumb & index finger palmer surface, spindle shape, margin clearcut 4cm x 1/2cm x muscle deep clotted blood;

11. Incised wound obliquely placed extend from palmer surface of Rt.middle finger at its middle to ring finger, spindle shape, margin clearcut, clotted blood present;

12. Incised wound at bone of pelvis 2cm x 1/2cm x muscle deep spindle shape, clear cut margin with clotted blood;

13. Incised would 1.5cm x 1/2cm x muscle deep spindle shape, margin sharp 3cm downward of Rt.side of inj.No.12 with clotted blood;

14. Incised wound spindle shape, clear cut margin upper ¼ of Lt.Lat. aspect of thigh 2cm x 1cm x muscle deep with clotted blood;

15. Incised wound Lt.side of perineum region spindle shape, margin clear cut, obliquely placed 2cm x 1/2cm x muscle deep with clotted blood."

In his opinion, the cause of death was shock as a result of internal & external haemorrhage due to injury to heart & stab wounds & various injuries.

15. Now, we proceed to deal with each piece of circumstances.

16. As regards the first circumstance, PW 9 Ahish Kumar, the Manager of Hotel Vilas, deposed that on 2.3.1999 at about 1.00 PM, three guests arrived at his hotel out of whom, he identified two of them present in the court as accused appellants. He allotted them Room No.108. He made an entry in the Register Ex.P.21 at item "A to B". The appellant Himmat Bhai put his signatures at place "x". All the three checked-in Room No.108. After putting the luggage, all the three went out. At about 8 PM while he was sitting on the counter of the hotel, all the three arrived. At about 8.30 PM, two of them i.e. the appellants left the hotel in huff. Soon, third person in pool of blood came down and disclosed his name as Vinod Chawda and blurted that Jaman caught hold of him and Himmat inflicted knife injuries.

17. P.W.16 Khushal Singh, deposed that he seized the Register Ex.P.21 of the hotel wherein entries of the guests were made in presence of PW 3 Rajendra Kumar and PW 5 Dharmilal Jain. He also obtained the specimen of the handwriting of Himmat Bhai vide Ex.P.49 to Ex.P.57. The disputed signatures of appellant Himmat Bhai at place "X" has been pointed as "Q1". As per the FSL Report Ex.P.59, the disputed signatures marked "Q1" were found to be in

the handwriting of the person who made specimen signature marked Ex.P.49 to 57 i.e. the signatures of the appellant Himmat Bhai in blue ball pen taken on 5.3.99. Thus, there is ample evidence to show that Himmat Bhai checked in the Room No.108 of Hotel Vilas. The events show that both the appellants with deceased on arrival at Mount Abu lodged in the Room No.108 of Hotel Vilas. They were seen leaving the hotel together at 1.00 P.M. and returned at 8.00 P.M. Thus, the prosecution from the evidence of P.W.9 Ashish Kumar corroborated by the evidence of entry of the name of Himmat Bhai in the Register Ex.P.21, has succeeded in establishing that the deceased was last seen in the company of both the appellants Himmat Bhai and Jaman Bhai. Both the appellants have failed to give any explanation as to how their third companion was seriously wounded.

18. As regards the dying declaration, it is contended by learned counsel that no reliance can be placed on oral dying declaration, which is a weak type of evidence, more particularly when there is no evidence worth the name to show that deceased was in fit condition to make statement. Reliance is placed on a decision of the Apex Court in Subbita Satyathi v. Bandala, reported in 2004 Cr.L.J. 3337. In the said case, there were two dying declarations. The oral dying declaration made to witnesses, was not found reliable, for the reason that they could not identify the accused persons,

further they admitted in the cross examination that they did not inform anybody. The said case has no application to the facts of the case. It is well established that if the dying declaration is acceptable as truthful event in the absence of corroborative evidence, the court may act upon it. However, it has to be approached with caution for the reason that maker of the statement cannot be subjected to cross examination. Normally, a dying declaration must be recorded in the presence of a medical officer and by a magistrate. However, in an appropriate case, the court can ignore the medical evidence testifying that the victim was unable to talk.

19. In the instant case, oral dying declaration was made before PW 9 Ashish Kumar. He deposed that while he was sitting on the counter, both the appellants passed through running and left the hotel in huff. After sometime, third person in pool of blood came down and disclosing his name as Vinod Chawda, gave out that Jaman caught hold of him and Himmat stabbed by knife. It would be convenient to extract the relevant part of the statement of PW 9 Ashish Kumar as follows:

> " रात्रि को आठ बजे जब मैं अपने काउंटर पर बैठा हुआ था, तब तीनों जने आये। हिम्मत व जमन दोनों भागते हुए काउंटर के आगे से निकले। तथा 5-7 मिनट बाद खून से लथपथ तीसरा आदमी अपने पेट पर हाथ रखे आया। उसने अपना नाम विनोद चावडा बताया कि जमन ने पकड़ा था तथा हिम्मत ने चाकू मारा हैं। "

20. The time gap between the occurrence and the death is hardly 40 minutes within which he was taken to the hospital, as such, there was no opportunity to get the dying declaration recorded by Magistrate and obtain a medical certificate as to the fitness. Admittedly, there is no animosity of P.W.9 Ashish Kumar with the appellants. Thus, there is absolutely no reason for him to make a false statement. The circumstances in which the declaratory statement has come, is cohesive and natural. It finds corroboration from the prompt F.I.R. containing full text of the brief dying declaration. It also finds corroboration from the medical evidence. Thus, taking into consideration all the relevant facts & circumstances of the case, in our view, the dying declaration made by deceased Vinod Bhai before PW 9 Ashish Kumar is creditworthy.

21. As regards the third piece of circumstance, appellant Himmat Bhai was arrested vide Ex.P.16. While in custody, he gave information vide Ex.P.41 leading to recovery of blood stained knife vide Ex.P.2 in the presence of PW 1 Wafati and Arjun. The knife was sealed and packed on the spot, which was deposited in the Malkhana and sent for chemical examination to the Forensic Science Laboratory. We are not dealing with the link evidence as the same has not been challenged by the learned counsel for the appellants. As per the FSL Report Ex.P.60, on serological

examination, the blood stains on the knife were found to be of human origin. Thus, the prosecution has succeeded in establishing the third circumstance which is of conclusive nature.

22. As regards the fourth circumstance, while appellant Himmat Bhai was arrested, he was wearing black shirt. There were blood spots on the same. The shirt was seized, packed & sealed vide Ex.P.18. As per the FSL Report Ex.P.60, on serological examination, the blood stains on the shirt have been found to be of human origin. The appellant Himmat has failed to give any explanation as to the presence of human blood on his shirt.

23. As regards the fifth circumstance, appellant Jaman Bhai was arrested vide Ex.P.17. At the time of arrest, it was noticed that there were blood stains on his pants and shirt. They were seized, packed & sealed vide Ex.P.19. As per the FSL Report Ex.P.60, on serological examination, the blood stains on the pants and shirt have been found to be of human origin. The appellant Jaman has failed to give any explanation as to presence of human blood on their clothes.

24. As regards the sixth circumstance, the place of occurrence i.e. Room No.108 of Hotel Vilas was inspected vide Ex.P.4. P.W.16 Khushal Singh deposed that with the

help of Incharge M.B.B.Branch of Police for chance print, he seized and sealed the incriminating articles like the bottle of liquor (Aristocrat) Article 5, quarter of "Open Challenge Rum" Article 6, bottle of Hayward Beer Article 7 and two glasses Articles 8 & 9 vide Ex.P.20. PW 20 Dinesh Kumar, second officer at Police Station deposed that he was with PW 16 Khushal Singh during investigation. He had taken specimen finger prints of both the appellants vide Ex.P.63 to 70 and 71 to 87. The chance prints and the specimen prints and articles were sent to the F.S.L. As already stated, we are not discussing the evidence in this regard, as the same has not been challenged. As per the report of the Finger Print Bureau, Ex.P.62 and 62A, the chance finger prints found on the bottles and glasses were similar to and identical with the appellants' specimen finger prints. Thus, the prosecution has successfully established the sixth circumstance as well, which is of conclusive nature.

25. Thus, the appellants Himmat Bhai and Jaman Bhai were the persons last seen with the deceased Vinod Bhai. All the three checked-in the Room No.108 of Hotel Vilas and returned to the room after outdoor visit during the day, as such, they had opportunity to commit the crime. Their conduct of running out of the hotel in huff, followed by the deceased coming down in pool of blood and giving out that Jaman caught hold of him and Himmat stabbed, the

presence of human blood on the apparels of the appellants at the time of their arrest within no time, the recovery of knife stained with human blood as per the FSL Report Ex.P.60, the group of blood collected from the floor of the Room No.108 vide Ex.P.5 and the group of blood present on apparels of both the appellants and the knife of the which were of the same group i.e. "AB", presence of finger prints of appellants on the bottles of liquor and glasses seized from the place of occurrence, excludes the reasonable possibility of anyone else being the perpetrators of the crime than the appellants and the consideration of chain of circumstances, which is so complete as to lead to the irresistible conclusion that within all human probability, the appellant Himmat and no other could be the assailant and that appellant Jaman shared common intention with him in the crime.

26. As regards the contention of the learned counsel to the effect that in absence of motive to commit murder, possibility cannot be ruled out that something happened at the spur of moment leading to unfortunate incidence, as such, it is a case of culpable homicide not amounting to murder punishable under Sec.304 (II) IPC. We are unable to persuade us to concede the submission, keeping in view the medical evidence i.e. multiple stab wounds on the person of deceased, which speak of mind of the appellants and their

intention to finish him. As regards the motive, it is well established that once the assault has been established by ocular or circumstantial evidence, motive pales into insignificance.

27. In view of the aforesaid, the appeal being devoid of merit, stands dismissed. Both the appellants Himmat Bhai and Jaman Bhai are in jail. They will serve out the remaining part of the sentence.

(R.P.VYAS), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS